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In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-701 and 73-708

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
WICHITA EAGLE & BEACON PUBLISHING CO., INC., ET AL.,
Respondents.

THE NEWSPAPER GUILD
Petitioner,
vs.
WICHITA EAGLE & BEACON PUBLISHING CO., INC.,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals (Petitions, App. A) is reported at 480 F.2d 52. The Decision and Order of the National Labor Relations Board (Board Pet., App. C) is reported at 199 N.L.R.B. No. 50.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly interpreted the National Labor Relations Act as not conferring jurisdiction upon the National Labor Relations Board over newspaper editorial writers who intimately participate in the formulation and expression of the position of the newspaper's management and owners regarding all issues deemed to be of public importance.

2. Whether the order of the Board directing the respondent newspaper to transfer one of its news department employees to her former position as an editorial writer, is supported by substantial evidence on the record considered as a whole.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the United States Constitution are as follows:

Article I, Section VIII:

> "The Congress shall have power . . . to regulate commerce. . . ."

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated. . . ."

Fifth Amendment:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . ."

Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The pertinent provisions of the National Labor Relations Act (29 U.S.C. Sec. 151, *et seq.*) are as follows:

Section 1:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce. . . ."

Section 2:

> "(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication. . . ."

Section 8(c):

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if

> such expression contains no threat of reprisal or force or promise of benefit."

Section 10(a):

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce."

STATEMENT

Respondent publishes a newspaper in Wichita, Kansas. Appearing daily on the editorial page of respondent's paper are a few paragraphs which state the views and opinions of the management and owners of the paper on topics of current public interest. (A. 24-5)[1] During the time period material, five persons were involved in the process of initiating, discussing and writing the paper's editorials. These five were the publisher, the president (who was also one of respondent's owners), and three writers, one of whom, Charles Pearson, was the editor of the editorial page. The other two writers were Dorothy Wood and Ted Blankenship. (A. 214-17)

Although the editorial staff members were included in respondent's news department, and while such departments are, in the newspaper industry, also commonly referred to as the editorial department, or as the news and editorial department, the offices of the three editorial writers were located next to the president's office, separated by considerable distance from the newsroom and from the employees actually engaged in the gathering and reporting of news. (A. 20-21, 95, 222) The editorial writers would normally meet daily with the publisher for formal

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1. "A." refers to the printed Appendix prepared for the Court of Appeals.

editorial conferences and, due to the proximity of their offices, would usually informally carry on discussions throughout the day with one another and with the president, concerning editorial content. (A. 26, 154, 181, 185, 218, 221-22)

During these conferences and discussions, any of the participants might suggest topics for consideration. A free exchange of ideas and viewpoints would take place, with each participant arguing for his subjective viewpoint as the appropriate one to be printed as the opinion of the paper's management and owners. (A. 95-96, 220) Unless both were absent, the editorial drafts were subject to revision or rejection by Pearson and the publisher. (A. 29)

Petitioner, the Newspaper Guild, organized respondent's news department during the spring and summer of 1970. (A.215) At the representation hearing before the regional director and also before the Board, petitioner objected to the inclusion of its editorial writers in the bargaining unit and to the jurisdiction of the Board over them. (A. 183-193) Pearson was excluded as a supervisor, but Wood and Blankenship were included in the unit over petitioner's objections that its freedoms under the First, Fourth, Fifth and Ninth Amendments would be infringed by the Board's assumption of jurisdiction over its editorial staff and that editorial writers have the characteristics of managerial or confidential employees. (A. 182, 183-93)

In January of 1971 the Wichita local of the Newspaper Guild was certified as the bargaining agent for the newsroom employees and for the two editorial writers. Shortly thereafter, Wood was elected as an officer of the union and as a member of its negotiating team. The publisher then denied Wood further permission to write editorials on labor-management issues. (A. 230-32) In August of 1971, Wood was elected to leadership of the Women's Politi-

cal Caucus, and invited the communications media to a charter meeting. On that occasion, she was identified on television and in the press as one of respondent's editorial writers. (A. 49-51, 236-37) The publisher then transferred her to a position in the newsroom with the same rate of pay, giving as the reasons for the transfer her diminished usefulness to the paper as an editorial writer, attributable to her public identification as a union official and as head of the Women's Political Caucus. (A. 239-40)

An unfair labor practice charge was filed with the Board on Wood's behalf. Following the hearing thereon, the trial examiner found that the publisher's claim that Wood's usefulness as an editorial writer had been diminished was a mere pretext, and that union animus was the underlying motive for her transfer. (A. 246) He reached this conclusion largely on the basis of the constitutional objections lodged by respondent in its brief in the representation proceeding and renewed at the unfair labor practice hearing, upon his interrogation and that of Board counsel regarding the paper's editorial policies and practices, upon testimony concerning the political leanings of the paper and the organizations to which its management belonged, and upon an analysis of certain of respondent's editorials measured by the trial examiner's standards for editorial writing. (A. 69-70, 102, 110-111, 121, 244, 234-36, 247-48) He recommended Wood's reinstatement as one of respondent's editorial writers. (A. 250-51) Respondent filed its exceptions thereto. The Board adopted, without comment, the trial examiner's recommended decision and order. (A. 255-60)

Upon respondent's petition for review and the Board's petition for enforcement of the order, the Court of Appeals for the Tenth Circuit refused to enforce the Board's order, holding that Wood was a managerial employee, that to

conclude otherwise would infringe respondent's constitutional freedoms, and that the order was without supporting substantial evidence on the record considered as a whole. (Board Pet., App. A) Thereafter, the Newspaper Guild was permitted to intervene, and both it and the Board filed with this Court their petitions for a writ of certiorari.

ARGUMENT

I

The Circuit Court's Holding That the Board Had No Jurisdiction Over Respondent Paper's Editorial Staff Is Clearly Correct, Does Not Conflict with Decisions of This Court or of Other Courts, and Presents No Important Question of Law Meriting Review.

The Court below was faced with a record burdened with violations of fundamental rights protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution, all of which violations resulted from the Board's assumption of jurisdiction over the paper's editorial staff and its investigation of the motive prompting Wood's transfer. By intruding directly upon the paper's editorial conferences and standards, and by probing into the thoughts, beliefs, attitudes and affiliations of its owners and management, the Board ignored the clear pronouncements of this Court as to:

Freedom of association and privacy in association. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449;

Forced disclosure of authorship of protected publications. *Talley* v. *California*, 362 U.S. 60;

The limits upon governmental regulations for public convenience when such regulations conflict with First Amendment rights. *Schneider* v. *Irvington*, 308 U.S. 147;

The Constitutional strictures against governmental activity which amounts to a prior restraint upon the press or a deterrent of speech or of the written word, which the Constitution makes free. *Near* v. *Minnesota*, 283 U.S. 697; *New York Times Co.* v. *Sul-*

livan, 376 U.S. 254; *Speiser* v. *Mandall*, 357 U.S. 513; *New York Times Co.* v. *United States*, 403 U.S. 713

The reinstatement of Wood to the paper's editorial staff would not only entail a continuing infringement of each of the foregoing protected activities, it would also require constant governmental surveillance of the paper's editorial processes in order to insure that Wood was included in all editorial conferences and that she was not discriminated against in the granting of editorial topics or in the editing of her submissions. Governmental policing of newspaper editorial conferences, of editorial assignments and of editorial composition is as clearly outlawed by the First Amendment as is government surveillance of religious affairs. *Lemon* v. *Kurtzman*, 403 U.S. 602.

Throughout the proceedings below, and in its petition to the Court, the Board has maintained steadfast silence as to the constitutional problems created by its assumption of jurisdiction over the paper's editorial processes and staff. The Guild, in its petition, maintains that this Court placed its stamp of approval upon the Board's conduct here by the decision in *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, a representation proceeding in which the employer, a major news wire service, made no substantive record. Notwithstanding the surface confusion created by newspaper terminology, which sanctions the designation of newspaper copywriters as editorial employees, the facts in *Associated Press* have nothing to do with employees intimately and directly involved in the formulation and composition of newspaper editorial policies, as the Court below readily perceived.

> "*Associated Press* dealt not with a person who was actively engaged in the 'formulating, determining and effectuating' of the employer's policies. *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F.2d 37 (7th Cir.); *Retail Clerks International Ass'n, AFL-*

CIO v. *NLRB*, 366 F.2d 642 (D.C. Cir.). Rather, that case dealt with a person who, although characterized as an 'editor' or 'editorial employee,' was employed '. . . to determine the news value of items received and speedily and accurately to rewrite the copy delivered to [him], so that the rewritten matter [should] be delivered to the various filing editors. . . responsible for its transmission, if appropriate, to the areas reached by their circuits.'

"Regardless of which appellation is given to the employee in *Associated Press*, whether it be 'editor,' 'editorial employee,' or a member of the 'news department,' his position was much more akin to that of the employees in the news department of the petitioning Wichita Eagle & Beacon Publishing Co., Inc., in the instant case than to that of Mrs. Wood. The hierarchy of personnel in Associated Press was such that the aggrieved employee was responsible, in turn, to a filing editor, various 'editorial employees,' 'supervising editors,' and an 'executive news editor' in the 'news department' of the Associated Press." (Board Pet., App. A, pp. 12-13)

There is no decision of this Court or any court which sanctions governmental regulation of a newspaper's editorial staff or investigation of its editorial policies and practices. As was its clear duty, *United States* v. *Rumely*, 345 U.S. 41, the Circuit Court construed the act so as to save it from such obvious constitutional infringement.

"To hold that a person who was involved in the formulation of editorial content of a newspaper is not aligned with the newspaper's management would come perilously close to infringing upon the newspaper's First Amendment guarantee of freedom of the press." (Board Pet., App. A, p. 14)

Surely, neither petitioner can sincerely expect this Court to overturn the holding below that an order compelling participation in a newspaper's editorial conferences and related editorial processes does ". . . infringe upon the newspaper's freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas." (Board Pet., App. A, p. 14) Alternatively, the decision of the Circuit Court is clearly supportable on the ground that editorials of a newspaper are strictly non-commercial in nature, and are not commerce within the meaning of Article I, Section VIII of the Constitution, nor commerce within the grant of power to the Board over labor disputes affecting commerce. *See, Pittsburgh Press Co. v. Pittsburgh Human Relations Comm.*, ... U.S. ....., 37 L.Ed. 2d 669.

The decision below does not rest upon the distinction between the Board's rule-making and adjudicatory processes when determining the proper definition of managerial employees, as in *Bell Aerospace Company Division of Tepton Inc. v. N.L.R.B.*, 2 Cir., 475 F.2d 485 (1973), cert. granted October 9, 1973, No. 72-1593. In view of the far more substantial constitutional considerations compelling the result below in the instant proceedings, the petition here should be promptly denied, regardless of the Court's disposition of the Bell case.

II

The Circuit Court's Determination That the Order of the Board Was Not Supported by Substantial Evidence Was Clearly Correct and Was Not a Departure from the Course of Accepted and Usual Judicial Proceedings.

The evidentiary foundation for the Board's order was provided by the illicit investigation conducted by the trial examiner and counsel for the Board concerning the paper's

editorial processes, editorial content, and editorial standards, as well as upon disclosures obtained concerning the organizational affiliations of its management, as aforesaid. In addition, the views expressed in the brief on behalf of the paper in the representation proceedings, and its legal position taken in the unfair labor practice proceedings, were used as evidence against the paper, notwithstanding the clear prohibitions of Section 8(c) of the Act, and notwithstanding the plain language of the First Amendment and the due process requirement of the Fifth Amendment. All such evidence was admitted and considered in direct disregard of Congressional and constitutional prohibitions. *Smith* v. *California*, 361 U.S. 147; *Griffin* v. *California*, 380 U.S. 609. A record consisting of such evidence cannot possibly provide substantial support for any affirmative order made thereon. The ruling below that the Board's order was without substantial support on the record considered as a whole was clearly correct. Only a contrary ruling would have merited the attention of this Court.

CONCLUSION

For the foregoing reasons the petitions herein for a writ of certiorari should be denied and without deferral of this cause to the Court's decision in No. 72-1598, *National Labor Relations Board* v. *Bell Aerospace Company*, certiorari granted October 9, 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing Brief of Respondent in Opposition to Petitions for a Writ of Certiorari on all parties separately represented herein and on the Solicitor General pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States by depositing the same in a United States mailbox with first class postage or airmail postage, prepaid, addressed to counsel of record at the following addresses:

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